IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 932

DARRELL D. MACINTYRE, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONER'S REPLY MEMORANDUM

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioner.

PAUL P. LIPTON,
625 North Milwaukee Street,
Milwaukee, Wisconsin 53202,

DONALD W. KAATZ,
119 Monona Avenue,
Madison, Wisconsin 53703,

Of Counsel.

BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 932

DARRELL D. MACINTYRE, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONER'S REPLY MEMORANDUM

The prosecution's facile sneer (Memo. Op. 4), that petitioner's argument "is an exercise in semantics," not only seeks to verbalize away a serious question of jurisdiction, and jurisdiction after all is power, but is undercut by two recent decisions in other circuits at variance with the ruling below in this case.

1. In *Thomas* v. *United States,* 368 F. 2d 941 (C.A. 5), reported since the petition herein was filed, the Fifth Circuit on collateral attack under 28 U.S.C. § 2255 vacated

a sentence within statutory limits, where it appeared that this sentence was imposed because the particular defendant had pleaded not guilty and had insisted on a trial. Plainly that is an *a fortiori* case, for here the contentions respecting sentence were made—and considered—on direct appeal. Yet this petitioner's appeal was dismissed.

2. In *United States* v. *Moody,* No. 16862, decided by the Sixth Circuit on January 27, 1967, the Court of Appeals after affirming a conviction remanded the case for reconsideration of the concurrent maximum sentence of imprisonment on four counts. The Sixth Circuit there followed its earlier decision in *United States* v. *West Coast News Company,* 357 F. 2d 855, 865, cited at Pet. 7.

The fact of the matter is that, realistically viewed, many circuits now do review sentences on appeal; they do not in terms modify the sentence imposed below, they do not direct the district court to substitute a different sentence, they simply vacate the sentence imposed and remand for resentencing. Since, in a hierarchical organization a suggestion is equivalent to a command, this amounts in substance to appellate review of sentences.

In the instant case, the court below dismissed the appeal without any suggestion in its memorandum (Pet. App. A1; Memo. Op. 2-3) that it deemed itself foreclosed from considering petitioner's contentions on any of the grounds now belatedly put forward at Memo. Op. 4.

Significantly, the prosecution does not urge here that the issue of disparate treatment and inequality in sentencing did not merit appellate review. Indeed, the prosecution concedes that the refusal by the court of appeals to reach the merits of that issue could present an appropriate instance for certiorari (Memo. Op. 4-5).

Petitioner submits that the dismissal of his appeal simply means that the court below concluded that, as it had previous decided in *United States* v. *Di Marie,* 261

F. 2d 477, 480—cited at Pet. App. A1 and Memo. Op. 4—that it was "without the ambit of [its] authority to review" a sentence. But that view runs counter to the rulings of the court below in the later *Wiley* cases (267 F. 2d 453; 278 F. 2d 500, both cited and discussed at Pet. 7), and to the rulings in other circuits adduced at Pet. 7-8 and in the present reply memorandum.

In short, this petitioner's case presents a vital issue of jurisdiction—of power—a question whose treatment up to now has been characterized by confusion, by *ad hoc* dispositions, and by conflicting rulings among the several circuits.

The resultant messy area requires tidying and doctrinal clarification. Accordingly we respectfully submit that the petition for certiorari in the present case should be granted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioner.

PAUL P. LIPTON,
625 North Milwaukee Street,
Milwaukee, Wisconsin 53202,

DONALD W. KAATZ,
119 Monona Avenue,
Madison, Wisconsin 53703,

Of Counsel.

FEBRUARY 1967.